Supreme Judicial Court of Maine.

BEDER FALES *v.* LUTHER HEMENWAY ET AL.

An unrestricted reference by rule of court of a suit pending upon a mortgage gives authority to the referee, if he finds the plaintiff entitled to recover, to determine the amount of the conditional judgment.

Where the mortgage is conditioned to be void upon the fulfilment by the mortgagors of their obligation to the mortgagee for a life maintenance and other things, the referee, if he finds a breach of the continuing condition, should make up the conditional judgment in such sum as in equity and good conscience is a present equivalent for full performance, including therein prospective as well as past damages.

WRIT OF ENTRY, originally commenced by Joseph Tolman upon a mortgage conditioned for his support by the respondents, as is stated in the opinion.

T. R. Simonton, for the defendants.

A. P. Gould and *J. E. Moore*, for the plaintiff.

BARROWS, J.—This case comes before us on exceptions to the report of the referee filed therein and the overruling of the defendants' objections thereto. The suit was originally commenced by Joseph Tolman, and is a writ of entry upon a mortgage given to him by the respondents, conditioned to be void if they fulfilled their obligation of same date to maintain him during the term of his natural life, furnish him with certain comforts and privileges, and do certain other acts in said obligation specified.

The objections relied on in argument here are that the referee had no authority to fix the amount for which the conditional judgment should be rendered, and no power to include in such judgment any damages for the breach of the defendant's obligation, except such as had accrued prior to the commencement of the action, and especially none for the future support of the mortgagee. * * *

[Here the opinion discusses some points of practice in references under rule of court, which are omitted as entirely local.]

The referee included in the sum for which the conditional judgment was to be awarded, besides the expense actually incurred for the support of the mortgagee up to the time of filing his report, general prospective damages for the breach of the defendant's obligation.

Ought the judgment so to be made up in a suit upon a mortgage conditioned to be void if the mortgagor fulfils an obligation to support the mortgagee during his natural life? When there is a breach of such an obligation and the mortgagee sues for possession of the mortgaged estate, shall his damages be assessed once for all, and the conditional judgment rendered for the amount, or is he entitled only to a conditional judgment for the cost of his support up to the time of the commencement of the action or the trial thereof in court?

It was held in *Sibley* v. *Rider*, 54 Maine 466, following the doctrine of *Philbrook* v. *Burgess*, 52 Maine 271, that the true measure of damages, and the sum for which conditional judgment should be rendered in a suit upon such a mortgage, "is a present equivalent for full performance; and if the parties submit without exceptions to a less sum, the judgment will nevertheless be conclusive." Satisfaction of it will operate as a complete satisfaction of the obligation and mortgage, so that no action can subsequently be maintained upon either. Hard as this may seem in a case where a party ignorant of his legal rights had had judgment in such a suit entered up for past damages only, we think a little reflection will make it clear that the contrary doctrine and practice would so completely deprive the mortgagee of any effectual remedy as to work still greater injustice.

There seems to have been at one time a doubt whether mortgages of this description were subject to redemption after breach of the condition; but this court held in *Bryant* v. *Erskine*, 55 Maine 157, that they are so.

And this is doubtless right; but it is easy to see that the mortgagee who, as is usual in such cases, has conveyed his whole estate, relying upon prompt and punctual performance by the mortgagor for his daily bread, would be in a sorry plight if he were forced to depend for his means of subsistence upon such credit as the right to maintain a succession of small suits for the recovery of money actually advanced would give him.

After paying the expenses of litigation, little would remain for the support of the obligee.

On the other hand, the party who receives a conveyance of property upon the strength of his agreement to furnish a life maintenance to the grantor, if required, when he fails to perform his contract, either to restore the possession of what he has received or

to furnish the means of making his undertaking good, has no cause of complaint. He simply abides the natural and necessary consequences of his own delinquency.

A review of the question only confirms us in the conviction that an adherence to the doctrine of *Sibley* v. *Rider*, and *Philbrook* v. *Burgess*, *ubi supra*, will best subserve both law and justice. It was the duty of the referee, standing as he did in the place of both judge and jury, to determine not only whether the continuing agreement of the defendants had been broken, but to ascertain what sum would be, in equity and good conscience, a present equivalent for full performance; and for such sum it would follow that a conditional judgment should be entered.

Exceptions overruled.

WALTON, DANFORTH and PETERS, JJ., concurred.
VIRGIN, J., concurred in the result.

There is a very important practical, as well as legal question involved in this case, but which the court seem to regard as settled by former decisions of the court under statutory provisions. This class of contracts is very common in the country, and it seems to us to involve questions not easy to be dealt with in many cases. A condition in a deed of land, dependant upon the performance of a contract for maintenance or support, in whatever form it is made, cannot be justly regarded as a mere mortgage for the security of a pecuniary obligation. The contract is unquestionably of a fiduciary and personal character, and one which courts of equity will not relieve against the forfeiture of, by any means, as matter of course. That is a matter resting in the discretion of the court, and dependant upon the circumstances of the particular case, unless controlled by statute. The conveyance, depending upon the continued performance of the condition, becomes inoperative upon failure, and a court of equity will not grant relief, even in the case of mere non-repair of the premises, where the neglect has been wilful or long-continued: *Hill* v. *Barclay*, 18 Ves. 56, where the general question is extensively discussed by Lord Chancellor ELDON. The same rule seems to have been then well established by the earlier decisions: *Bracebridge* v. *Buckley*, 2 Price 200; *Eaton* v. *Lyon*, 3 Ves. 693. And still, a covenant to repair, although involving personal service, is as much susceptible of pecuniary compensation as almost any other, and we doubt not a forfeiture of this kind would ordinarily, in this country, be relieved against in equity. But a contract for maintenance and support is of a very different character. It is as strictly fiduciary and personal as any other, and has often been so held. Hence it has been held that such contracts are not assignable, as it is of their very essence that they should be performed by and between the parties to the contract: *Bethlehem* v. *Annis*, 40 N. H. 34. A d where the contract was to pay a debt of a certain amount by supporting the mortgagee for a certain agreed term, it was held the mortgagee could not relieve himself from the condition by paying the money: *Hawkins* v. *Clement*, 15 Mich. 513. But it seems

to have been held in many of the states that where the mortgagee has failed to perform the condition, equity will relieve by decreeing an equivalent in money: *Wilder* v *Whittemore*, 15 Mass. 262; *Fiske* v. *Fiske*, 20 Pick. 499; *Bethlehem* v. *Annis*, *supra*. And the cases cited in the principal case show that such has long been the practice in Maine. But the subject is controlled by statute in all these states: Hilliard on Mort. 119, in note. And the case of *Austin* v. *Austin*, 9 Vt. 420, is cited by text-writers as having established the same rule in that state. But the later cases there do not admit an unqualified right of redemption in the mortgagor in this class of contracts, but, at most, only in the discretion of the court, and where the failure to perform the contract has not been wilful, and is reasonably susceptible of compensation in money: *Henry* v. *Tupper*, 29 Vt. 358; *Olcott* v. *Dunklee* v. 16 Vt. 478; *Tracy* v. *Hutchins*, 36 Vt. 225.

We think it must be obvious to any one that if there is any class of contracts where courts of equity would be justified in holding a firm hand upon claims for relief from wilful and wanton forfeitures, it would surely be expected here. We have said all we desire to say in regard to the question in *Henry* v. *Tupper*, *supra*, where the authorities are carefully reviewed, and the same will be found in our edition of Story's Eq. Jur. § 1326 *a*, and note. I. F. R.

Supreme Court of Ohio.

REASIN W. SHAWHAN *v.* PETER VAN NEST.

Where the plaintiff, in pursuance of an agreement with the defendant, furnished the materials and constructed a carriage for the defendant, in accordance with his order and directions, for which a stipulated price was to be paid, and the defendant refused to receive and pay for it when completed and tendered—*Held*, that in an action brought for that purpose, the plaintiff is entitled to recover the contract-price and interest from the time the money should have been paid.

MOTION for leave to file a petition in error.

The contract between the parties was substantially as follows: Van Nest, a carriage-maker, agreed with Shawhan, on the 1st of August 1871, that for seven hundred dollars he would furnish the materials and make for Shawhan a two-seated carriage in accordance with his directions, and have the same completed and ready for delivery at Van Nest's shop on the 1st day of October following; in consideration of which Shawhan agreed to accept the carriage at the shop, and pay Van Nest the contract-price for it.

In his petition in the Court of Common Pleas, Van Nest set out the contract in terms, and averred that he had complied with it in all respects on his part, and that on the 1st of October 1871, he tendered the carriage to Shawhan at his shop, and requested him to accept and pay for it, which he refused to do. Judgment was